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No. 520

Supreme Court of the United States

October Term, 1957

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY, CITY OF TYLER, TEXAS, FEDERAL POWER COMMISSION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,623

TYLER GAS SERVICE COMPANY, and CITY OF TYLER, TEXAS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Decided August 1, 1957

Mr. Bryce Rea, Jr., and *Mr. Thomas B. Ramey* of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court, with whom *Mr. Donald E. Cross* was on the brief, for petitioners.

Mr. Louis L. DaPra, Attorney, Federal Power Commission, of the bar of the Supreme Court of Indiana, *pro hac vice*, by special leave of court, with whom *Messrs. Willard W. Gatchell*, General counsel, Federal Power Commission, *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, and *W. Russell Gorman*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas Fletcher, with whom *Mr. C. Huffman Lewis* was on the brief, for intervenor.

Mr. William C. Chanler, with whom *Mr. Lawrence A. Baker* was on the brief, for McMurrey Refining Company, as *amicus curiae*, urging reversal.

Before BAZELON, WASHINGTON, and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This proceeding is to review an order of the Federal Power Commission (hereinafter called the Commission) denying a motion of Tyler Gas Service Company (hereinafter called Tyler Gas) for refund of sums paid to intervenor, United Gas Pipe Line Company (hereinafter called United), and two joint petitions by Tyler Gas and the City of Tyler to reject rate schedules filed by United to increase rates specified in a contract between Tyler Gas and United.

The record discloses that the franchise of Tyler Gas as distributor of natural gas for the City of Tyler was to expire in 1946. In that year, natural gas was in abundant supply in the vicinity of the City of Tyler, by reason of the proximity of a number of producing fields. As the expiration of the Tyler Gas franchise neared, a group of citizens appeared before the Tyler City Commission with the proposal that the franchise be not renewed, that a new distributing company be organized, which would procure its gas from new sources at a price less than Tyler Gas paid United, its supplier, and suggesting that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this proposal and, for a period of several months, had it under consideration.

Tyler Gas wished its franchise renewed, and United was anxious to retain this market for its product. After considerable negotiation, United consented to a reduction in price to Tyler Gas for domestic consumption, from 22½¢ to 12¢ per MCF, if the City of Tyler would renew the Tyler Gas franchise. A new franchise was prepared, specifying the rates to be charged consumers, the rates being predicated on a rate of 12¢ per MCF from United to Tyler Gas for domestic and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ per MCF for industrial gas.

On April 3, 1946, United addressed a letter to the City of Tyler wherein United agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years. In reliance on the representation of United, the proponents of the new and competing company withdrew the application for its franchise, the City of Tyler renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract between United and Tyler Gas was amended accordingly. The amended contract was to run until 1962.

By the Commission's Order No. 144, dated October 30, 1948, it was provided that existing rate schedules, which set forth rates in terms of percentages of receipts, should be replaced by schedules setting forth the rates in terms of dollars and cents per unit. This order was issued to bring all rates schedules in line insofar as terms of dollars and cents per unit were concerned, and was not the result of independent action on the part of United, Tyler Gas or the City of Tyler. On July 30, 1952, United filed with the Commission a so-called "conversion tariff," in accordance with Order No. 144.

The contract with Tyler Gas covered both industrial and domestic sales. The conversion tariff slightly increased the rate on industrial sales and decreased it on domestic sales, with a resultant small increase in the rates at that time being paid under the contract.

On June 24, 1953, United filed schedules of increased rates for both domestic and industrial gas and, on July 10, 1953, the Commission issued an order suspending the increased rates for five months, pending a hearing. This suspension did not apply to rates applicable to sales for industrial use only. Tyler Gas intervened in the proceedings and opposed the rates.

In December 1953, Tyler Gas and the City of Tyler filed a complaint with the United States District Court for the Eastern District of Texas, seeking a preliminary injunction to restrain United from putting its increases into effect, and for declaratory judgment declaring the contracts to be valid and existing. The District Court denied the application for preliminary injunction and, on motion of United, dismissed the complaint. The United States Court of Appeals for the Fifth Circuit affirmed. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (1954).

During the pendency of the proceedings in the Fifth Circuit, hearings were held for the purpose of considering a proposal for settlement of United's schedule of general rate increases, and Tyler Gas requested that this settlement remain open for the determination of the issues raised in the petition to intervene by Tyler Gas. This was done.

Following the decision by the Supreme Court in the *Mobile* case,[1] Tyler Gas filed a motion for refund of the amounts United had been collecting pursuant to the order

[1] *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956).

of the Commission dated January 25, 1954, and later filed, jointly with the City of Tyler, petitions to reject two schedules for further rate increases filed by United subsequent to the January 25, 1954, order of the Commission. The Commission denied the motion and the joint petitions, holding that the *Mobile* case was not applicable and that Tyler Gas had no rights under its contract which, by its terms, ran until 1962. The basis of the Commission's decision was (1) that the case could be distinguished from the *Mobile* case, and (2) that the action of the Circuit Court of Appeals for the Fifth Circuit was *res judicata* insofar as Tyler Gas was concerned.

The questions presented on this appeal are two: first, is this case distinguishable from the *Mobile* case; and, second, was the judgment of the Fifth Circuit in the prior litigation *res judicata*? Our answer to both questions is in the negative.

Respondent's position that this case is distinguishable from *Mobile* is based on the contention that the United conversion tariff, filed pursuant to Commission Order No. 144, was a unilateral change in the contract rates as to Tyler Gas, and that from the time of that change the contract did not bar further unilateral increases in rates. Particular reliance is placed on the fact that the conversion tariff effected some upward change in the cost of natural gas supplied to Tyler Gas by United. From this, respondent argues that Tyler Gas had no binding contractual rights to any rate and that United, by filing with the Commission a higher rate schedule, could unilaterally increase the price of gas to Tyler Gas. This, it is said, makes inapplicable the decision in *Mobile*

that the Natural Gas Act, 15 U.S.C. § 717 (a) - (w) (in particular, § 4 (d)), confers no power to effect changes in contracts by unilateral action. According to respondent, at the time the rate increases were filed here there was no longer a right to obtain gas at any contract price.

In the *Mobile* case, United had a contract with Mobile to furnish gas for a certain industrial user at a certain percentage of the sale price paid Mobile by the user. Under Commission Order No. 144, United was directed to and did file a conversion tariff, which the Third Circuit found ". . . *almost* identical with the amount the Mobile percentage rate actually figured." [Emphasis supplied.] *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883, 884 (3d Cir. 1954), aff'd, 350 U.S. 332 (1956). Mobile acquiesced in the conversion tariff and was thereafter billed at and paid the conversion rate until United applied for an increase in its industrial rates and the Commission ordered the increased rate paid. It was this increased rate, absent a finding that the contract rate was in conflict with the public interest, which the Supreme Court ruled a nullity. This is exactly the case before us.

The fact that the conversion tariff acquiesced in by Tyler Gas slightly changed the cost to it, as compared to the original contract percentage rate, cannot distinguish this case from Mobile,[2] for there the converted tariff did not result in cost *identical* to that under the original contract. The Third Circuit, in the *Mobile* case, regarded the conversion tariff as becoming a part of an unchanged

[2] There is some disagreement between the parties as to the amount of the higher cost under the conversion tariff. Tyler Gas tells us it was a difference of $2,000.88, or 1%, while respondent claims the difference was $7,900.00, or 3%. The data to determine which figure, if either, is correct is not before us, even if we were interested in computing the difference.

contract. See 215 F. 2d at 891, n. 16. This is plainly right. The fact that Tyler Gas inferentially consented to a slightly higher cost of gas in the conversion tariff filed pursuant to Commission Order No. 144 is no basis for saying that it has agreed to be bound by later unilateral rate increases. Tyler Gas has never abandoned its contract; the contract has not been mutually rescinded. So long as Tyler Gas has a valid, subsisting contract with United, the cost of gas cannot be unilaterally varied unless the Commission first finds that the contract rate is in conflict with the public interest. The rules of the Commission itself support the view that modification of a contract does not abrogate it. This is clear from 18 C.F.R. § 154.85 (1949), which reads as follows:

"*Status of contracts filed as rate schedules and restated.*

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: *Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided further, however,* That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

The Supreme Court has decided, in the *Mobile* case, that the Natural Gas Act does not permit unilateral changes in rate contracts. This is exactly what respondent has permitted to be done here. We can find no sound basis in fact or principle to distinguish this case from *Mobile*.

For the above reasons, we conclude that the answer to the first question presented in this case must be "No."

II

There is no occasion for lengthy comment as to our conclusion on the second question before us. A decision dismissing a complaint for lack of jurisdiction cannot be *res judicata* as to the substantive merits of the complaint. *Hughes* v. *United States*, 71 U.S. 232 (1866).

Our view of the decision in *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, *supra*, is that dismissal of Tyler Gas' complaint was based on a lack of jurisdiction to grant equitable relief as to matters then pending before an administrative agency empowered to regulate natural gas rates, and to afford an adequate remedy. Whatever the purpose of the comments of the Fifth Circuit and the District Court on the merits of the action, we think that both quite properly decided the case on the basis of jurisdiction. The Fifth Circuit regarded the District Court's holding to be ". . . that plaintiffs must, therefore, seek such relief as they may be entitled to under the statute from the commission and not from the court." 217 F. 2d at 76. In its opinion (p. 77), the court stated: ". . . the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in

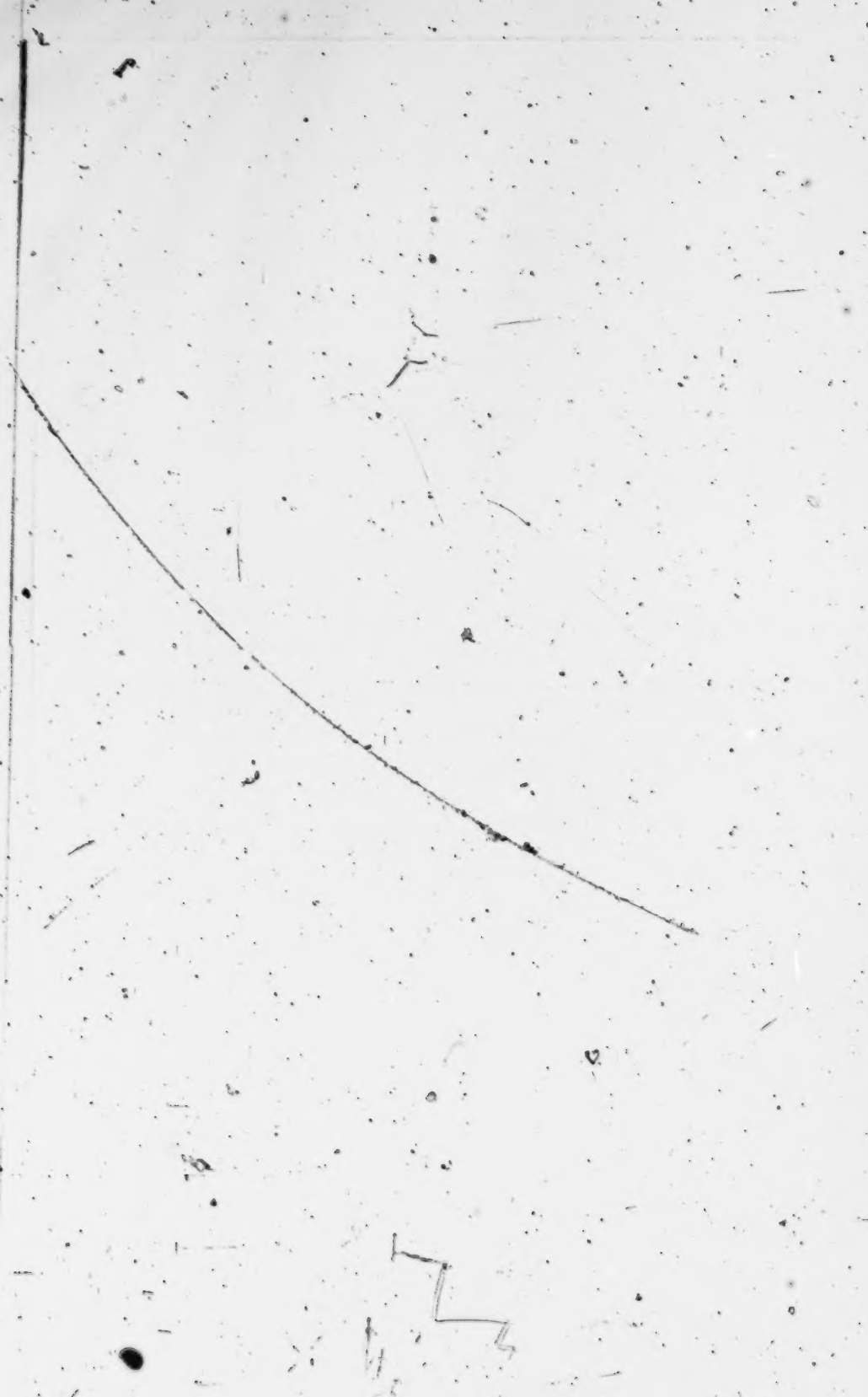
accordance with the Act." Later in its decision, the court recites:

> "Assuming without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong [in the *Mobile* case], we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief . . .'"

We cannot see how a decision that a party must seek relief before an administrative agency can be *res judicata* of the merits of the agency's later denial of the relief requested.

The order denying the motion of Tyler Gas for refund is reversed. The order denying the petitions to reject the rate schedules filed by United are likewise reversed.

Because of the disposition we make of this case, no other matters briefed or argued need be discussed.



United States Court of Appeals
for the
District of Columbia Circuit
Filed August 1, 1957
JOSEPH W. STEWART
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,623
April Term, 1957

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Washington and Bastian, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the Federal Power Commission on review in this case be, and they are hereby, reversed, and that this case be, and it is hereby, remanded to the said Federal Power Commission for further proceedings not inconsistent with the opinion of this Court.

Dated: August 1, 1957.

Per Curiam.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, *Chairman*; SEABORN L. DIGBY, FREDERICK STUECK, WILLIAM R. CONNOLE and ARTHUR KLINE.

In the Matters of	Docket Nos.
United Gas Pipe Line Company	G-1142, G-2210, G-9547 and G-10592

Opinion No. 294

OPINION AND ORDER DENYING MOTION FOR REFUND AND DENYING PETITIONS FOR REJECTION OF RATE FILINGS

(Issued October 2, 1956)

These are rate proceedings involving the rates charged by United Gas Pipe Line Company (United) to Tyler Gas Service Company (Tyler Gas) for natural-gas service rendered to it. The proceedings arise from rate increase proposals filed with the Commission. Specifically, they pertain to a motion filed on May 15, 1956, by Tyler Gas to require United to refund certain moneys collected pursuant to an undertaking to refund in Docket No. G-2210 and joint petitions filed on October 21, 1955, in Docket No. G-9547 and on June 15, 1956, in Docket No. G-10592 by Tyler Gas and the City of Tyler, Texas, seeking rejection of rate increase filings of United in those dockets. United opposes

the requests of Tyler Gas and the City of Tyler. Since the motion and the two petitions raise the same issue of the Commission's power under the Natural Gas Act (Act), we heard oral argument on all three together on July 13, 1956.

The motion and the joint petitions raise the primary question of the Commission's power to entertain the rate increase proposals filed by United in the three dockets without the consent of Tyler Gas. United defends the assertion of Commission power to accept the filing of changes in tariff rates and, in addition, in opposition to the motion for refunds, claims that the decision of the Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, 217 F. 2d 73, bars Commission action granting refunds in Docket No. G-2210. We have carefully examined the contentions of the parties, including the argument by Tyler Gas and the City of Tyler that the decision of the United States Supreme Court in the *Mobile* case[1] requires us to take the action requested by them. We conclude that none of the filings in Docket Nos. G-2210, G-9547 or G-10592 is governed by the *Mobile* case; that the *ex parte* filings of tariff rates by United were properly made in pursuance to the Commission's regulations and the provisions of the Natural Gas Act; and that the motion and the joint petitions must be denied. Additionally, with respect to the motion for refunds in Docket No. G-2210, we conclude that the decision of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court constitutes a bar to relitigation of the issues which were raised, or might have been raised, by Tyler Gas in that proceeding.

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[1] *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332.

A brief resume of the history of the rate proceedings involving Tyler Gas and United will aid in understanding our decision herein. The original contract between United and Tyler Gas, entered into on November 22, 1940, provided for a rate of 22.5¢ per Mcf for gas to be resold for domestic use. For gas to be resold for industrial use only, United received 80% of the proceeds received by Tyler Gas from the industrial sales, but not less than 16¢ per Mcf. In accordance with the Commission's General Rules and Regulations effective at that time, the contract was filed by United on January 3, 1941, and by order of February 12, 1941, the Commission permitted the contract to become effective as United's FPC Gas Rate Schedule No. 42.

Service was rendered under this contract, with amendments not significant here, until 1946 when, pursuant to agreement between the parties, the contract was revised to provide for a substantial reduction in rates. Under the amended contract, filed as Supplements Nos. 3 and 4 to United's FPC Gas Rate Schedule No. 42 and effective as of May 10, 1946, the rate for resale for domestic use was reduced to 12¢ per Mcf and the rate for resale for industrial use only, stated in terms of 80% of the proceeds received by Tyler Gas for those sales, was likewise reduced so that the minimum to be received by United was 7.2¢ per Mcf. The term of the amended contract was 16 years.

From May 10, 1946, until August 3, 1952, United rendered service to Tyler Gas pursuant to the amended contract. On July 3, 1952, United filed its proposed conversion tariff, submitted in compliance with the Commission's Order No. 144, Docket No. R-107. Among other things, the conversion tariff (United's FPC Gas Tariff, Original Volume No. 1) which became effective for service rendered to Tyler Gas on August 3, 1952, changed the rates for the sale of gas to Tyler Gas. The rate for resale for domestic use was reduced

to 11.2¢ and the minimum rate for resale for industrial use only was increased to 7.5¢. In over-all effect the dollar amount paid by Tyler Gas to United was increased approximately $7,900 annually. Tyler Gas filed a letter protesting the filing. However, Tyler Gas did not petition to intervene in the proceeding nor seek review of the Commission's order permitting the conversion tariff to become effective as to sales to Tyler Gas. Hence, the order became final and binding upon Tyler Gas.

At this point the purpose and effect of the conversion tariff should be made clear. In issuing Order No. 144 in Docket No. R-107 on October 30, 1948, we required all natural-gas companies to convert their contracts filed as rate schedules into tariff form. We recognized that prior to the passage of the Natural Gas Act natural-gas companies had no rate schedules generally applicable to stated classes of service. The prevailing practice was to sell natural gas under individual contracts arrived at after extensive negotiations between the parties. These contracts varied greatly in form and content but to expedite the establishment of legal rates at the inception of regulation under the Natural Gas Act we permitted natural-gas companies to file their contracts as rate schedules. Amendments to the rate contracts filed as supplements to the rate schedules complicated matters further.

Prior to World War II we undertook to revise this cumbersome method of filing which resulted not only in administrative inefficiency but also in possible discrimination among customers. However, before we could institute a uniform procedure, the war and consequent lack of manpower intervened. Later, through informal cooperation between many natural-gas companies and the Commission's Staff, whereby the natural-gas companies converted from contract to tariff rates, the efficacy of the tariff procedure

was proven. Therefore, we issued our Order No. 144 revising our General Rules and Regulations to require the filing of tariffs in place of the myriad of contracts on file as rate schedules.

An FPC gas tariff filed in pursuance to Order No. 144 contains in one volume all information pertinent to jurisdictional service rendered by the natural-gas company. First, there are set forth the rate schedules for all classes of service (an index of purchasers identifying the rate schedules under which each buys gas is contained at the end of the volume). Following the rate schedules are the General Terms and Conditions which make uniform for all service rendered by the natural-gas company such provisions as the definition of terms, the quality and measurement of gas to be delivered, billing, payments, and delivery pressures. Also included within the tariff is the form service agreement to be executed by the natural-gas company and the purchasing companies. With such a tariff, all conditions of service, including the rates, can be readily ascertained for all purchasers from one natural-gas company.

Absent the execution of the form service agreement by the natural-gas company and a purchaser, Section 154.85 of the Commission's Regulations, made effective through Order No. 144, provides that "each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff."

When United filed its conversion tariff on July 3, 1952, its contract with Tyler Gas remained in effect as an executed

service agreement pursuant to the terms of the above-quoted regulation. Inserted in the front of the pre-existing contract there is a statement identifying the contract provisions remaining in effect and those which were superseded by the conversion tariff. This pre-existing contract statement shows that the rate terms of the contract, among other terms such as measurement of the gas, were superseded and no longer remain in effect.

By order issued July 30, 1952, the Commission accepted this revision in the course of business proposed by United and accepted by Tyler Gas, and the conversion tariff became effective as of August 3, 1952. Although Tyler Gas did file a letter of protest to the conversion tariff it did not seek review of the order permitting it to become effective and in its motion for refunds in Docket No. G-2210 asks to be returned to the tariff rates contained in the conversion tariff. It is clear, therefore, that we are not here concerned, either in the motion for refunds or in the joint petitions for rejection, with contract rates. We are here dealing with tariff rates, filed *ex parte* by United, as revised by new tariff rates also filed *ex parte* by United.

Service was rendered pursuant to the conversion tariff rates until United filed a proposed *ex parte* change in the tariff rates to Tyler Gas in Docket No. G-2210 on June 24, 1953. By order issued July 10, 1953, we permitted the rate for resale for industrial use only to take effect on July 25, 1953, subject to final determination in the proceedings as to its future effect but we suspended the rate for resale for domestic use until December 25, 1953, when it could be made effective on motion of United. This *ex parte* filing provided for rates of 20¢ per Mcf for the first block and 12.5¢ per Mcf for the second block for gas resold for domestic use and 13¢ per Mcf for gas resold for industrial use only, an overall increase in rates of approximately 70%. Tyler Gas

objected to the proposed increase and filed a petition to intervene in the proceeding.[2]

Initial hearings on the matters involved in Docket No. G-2210 were held on July 20, 1953, but were not completed before the end of the suspension period when United could move to put the rates into effect, subject to refund, in accordance with Section 4 (e) of the Act. In order to forestall the new tariff rates for resale for domestic use from going into effect subject to refund as of December 25, 1953, Tyler Gas filed a petition for injunction in the U.S. District Court for the Eastern District of Texas, Tyler Division, seeking to enjoin United from moving to put the rates into effect. The District Court denied the injunction for failure to show grounds for equitable relief (Civil No. 1662 issued January 26, 1954). Upon appeal by Tyler Gas the lower court was affirmed by the Court of Appeals for the Fifth Circuit. *Tyler Gas Service Company, et al.* v. *United Gas Pipe Line Company*, 217 F. 2d 73. When Tyler Gas did not seek *certiorari* the decision of the Fifth Circuit became final and binding upon it. Meanwhile, pursuant to our order issued January 25, 1954, the increased rates for sale of gas to Tyler Gas for resale for domestic use went into effect, subject to refund, as of December 25, 1953.

In our Opinion No. 277 issued on November 2, 1954, in Docket Nos. G-1142, G-2210, *et al.*, we determined the just and reasonable rates to be charged by United to its jurisdictional customers.[3] Tyler Gas did not contest the rate level found to be just and reasonable and, with the City of Tyler, stated on the record its acceptance of the terms of the proposed

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[2] The July 10, 1953 order consolidated the rate increase proceeding in Docket No. G-2210 with other proceedings involving the rates of United, including Docket No. G-1142 which involved a Section 5 (a) investigation into the entire rate structure of United.

[3] Opinion No. 277 accepted a settlement agreement among the parties to the proceeding as being appropriate and in the public interest.

settlement subject to the outcome of the litigation then pending before the United States Court of Appeals for the Fifth Circuit. We disallowed and denied the rate increases proposed by the *ex parte* filing of United in Docket No. G-2210 and directed the filing of new rates, to be effective as of August 1, 1954, in conformity with our findings and the settlement agreement among the parties. However, because of the pendency of the appeal by Tyler (the Court of Appeals issued its decision in the *Tyler Gas* case on November 24, 1954) we provided that the proceedings in Docket No. G-2210 should remain open for a determination of the issues raised by Tyler Gas and the City of Tyler and the rates to Tyler Gas continued subject to refund. To protect Tyler Gas from paying more than the lawful rate pending the court decision, we stayed our order in Docket No. G-2210 to the extent Tyler Gas would be required to pay more than the settlement rates applicable to it. From the date the decision of the Court of Appeals became final, the contingency provided for in Opinion No. 277 having been satisfied, the settlement rates became applicable to United's sales to Tyler Gas.[4] It is clear, therefore, that Tyler Gas was fully protected from paying more than the lawful rate pending our determination.

Tyler Gas argues that it is entitled to refunds of all amounts collected by United in excess of the conversion tariff rate for resale for domestic use of 11.2¢.[5] It seeks this result regardless of the determination of the lawful rates in Opinion No. 277. It bases its argument upon the holding

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[4] Pursuant to Opinion No. 277 the rates to Tyler Gas, effective as of August 1, 1954, were 17¢ per Mcf for the first block and 12.5¢ per Mcf for the second block for gas resold for domestic use. For gas resold for industrial use the rate was 12.5¢ per Mcf.

[5] Tyler Gas does not ask for restitution of the increase in the rate for resale for industrial use above the 7.5¢ per Mcf minimum contained in the conversion tariff.

of the Supreme Court in the *Mobile* case which was handed down subsequent to the decision of the Court of Appeals for the Fifth Circuit in the *Tyler Gas* case. But the *Mobile* case is distinguishable from the situation involved here either in Docket No. G-2210 or in the two later rate increase proceedings in Docket Nos. G-9547 and G-10592.

The *Mobile* case involved a contract rate for resale for industrial use only which United attempted to set aside by its unilateral filing. Pursuant to Section 4 (e) the rate increase was not suspended or made effective subject to refund. The Supreme Court held that a natural-gas company cannot, by a unilateral filing under Section 4 of the Act, effect a change in a contract rate. With respect to Mobile, United had filed its conversion tariff but, unlike the departure from the contract rates to Tyler Gas effected by the conversion tariff, the conversion tariff did not change the contract rate or charge to Mobile. This significant difference sets the two cases apart in fact and in law. In Mobile, the conversion tariff filing merely restated the rate from a percentage figure to a specific amount. The rate contracted for remained intact and the Court held that the rate filing in G-2210 was an abrogation of contract. But, in the *Tyler Gas* case, as the Court of Appeals for the Fifth Circuit held, the revised tariff rates proposed for the sale of gas to Tyler Gas were not violative of contract rights and were properly filed. As we have shown, prior to the filing of the conversion tariff, United received, pursuant to contract with Tyler Gas, 12¢ per Mcf for gas resold for domestic use and 80% of the proceeds of gas resold for industrial use. When the conversion tariff became effective, the rates were changed to 11.2¢ per Mcf for gas resold for domestic use and 7.5¢ per Mcf for gas resold for industrial use. Clearly, this was not just a restatement of a percentage

amount in cents per Mcf. The rate for gas resold for domestic use, which never had been stated in terms of a percentage of the amount received by Tyler Gas, was reduced 0.8¢ per Mcf. United had, in accordance with the Commission's Regulations, converted from a contract rate to an *ex parte* tariff rate. And, Tyler Gas acquiesced in this significant change in its course of business. It accepted service rendered and paid for it in adherence to the new tariff rates from the date they became effective on August 3, 1952, until an increase in the tariff rates became effective subject to refund in Docket No. G-2210.

Indeed, Tyler Gas does not now seek to return to its contract rate. It accepts the tariff rate but inconsistently argues that United has no power to file later changes of the same character. As we have shown, however, the contract rate ceased to exist on August 3, 1952. From that date, the course of business between United and Tyler Gas has been governed by *ex parte* tariff rates. Tyler Gas cannot now claim the validity of a non-existent contract provision to support one *ex parte* rate over another *ex parte* rate subsequently filed. The existence of *ex parte* tariff rates for the sale of gas to Tyler Gas having been established by the conversion tariff, changes in those rates may be filed *ex parte* without the prior agreement of the purchaser in accordance with appropriate procedure under the Act, for such a filing abrogates no contract rights. [6]

[6] Of course, the mere filing of an *ex parte* tariff rate does not constitute approval of the change by the Commission. The *ex parte* filing of a proposed change in the tariff rate in Docket No. G-2210, applicable to sales of gas to Tyler Gas for resale for domestic use, became effective only provisionally on December 25, 1953. After full hearing, in which Tyler Gas participated, we disallowed the provisional rates and, when the Court of Appeals determined the procedural issue raised by Tyler Gas, a lower rate became effective in accordance with Opinion No. 277. We also directed the filing of a lower rate for resale for industrial use only. Hearings as to the reasonableness of the rates contained in the *ex parte* filings in Docket Nos. G-9547 and G-10592 have not yet been completed.

Tyler Gas and the City of Tyler filed their joint petition for rejection of United's rate filing in Docket No. G-9547 on October 21, 1955. On September 30, 1955, United had filed revisions to its tariff rates contained in its FPC Gas Tariff, First Revised Volume No. 1, proposing a general increase in its jurisdictional city gate rates. Included among the proposed revisions of its tariff rates were United's First Revised Sheets Nos. 4 and 16, which set forth the rate for the sale of gas to Tyler Gas for resale for domestic use (United's FPC Rate Schedule DG-C—General Service for Large Volume Distributors, Central Rate Zone) and for industrial use (United's FPC Rate Schedule IND-C—Large Volume Industrial Use Only, Central Rate Zone). By these proposed revisions to its tariff rates United sought to increase its then effective rates for resale for domestic use by 2.5¢ per Mcf and for resale for industrial use only by 4.0¢ per Mcf.[7] Pursuant to Section 4 of the Act, by order issued October 26, 1955, we suspended the proposed revision in the rates so far as it related to sales for resale for domestic use (First Revised Sheet No. 4) until April 1, 1956. These rates are now in effect subject to refund upon final determination of the just and reasonable rates. By their joint petition Tyler Gas and the City of Tyler request an order rejecting the revised rates contained in First Revised Sheets Nos. 4 and 16 so far as they relate to sales to Tyler Gas.

The second joint petition, filed by Tyler Gas and the City of Tyler on June 15, 1956, asks rejection of United's latest filed revision to its tariff rates in Docket No. G-10592, so far as it relates to sales of gas to Tyler Gas. By this revision, filed on May 15, 1956, United proposes an increase in the

[7] United's *ex parte* filing in G-9547 would change the rate for resale for domestic use from 17¢ per Mcf to 19.5¢ per Mcf for the first block and from 12.5¢ per Mcf to 15¢ per Mcf for the second block. The rate for resale for industrial use would increase from 12.5¢ per Mcf to 16.5¢ per Mcf.

Docket No. G-9547 rates. Its proposed Second Revised Sheet No. 4 would increase the rate to Tyler Gas, for resale for domestic use, by 1.0¢ per Mcf and, subject to final determination by the Commission, United's proposed Second Revised Sheet No. 16 increased the rate for resale for industrial use under the IND-C rate schedule from 16.5¢ to 17.5¢ per Mcf. By order issued June 15, 1956, we suspended the effectiveness of the proposed rates for resale for domestic use until November 16, 1956, and until such further time as they may be made effective in the manner prescribed by the Natural Gas Act. We conclude that United's filings in Docket Nos. G-9547 and G-10592 are governed by the same rule which controls our action in the motion for refunds in Docket No. G-2210. They are, like the *ex parte* filings in the conversion tariff and in Docket No. G-2210, proper proposals for changes in *ex parte* tariff rates. We cannot reject the proposals in Docket Nos. G-9547 and G-10592 on the procedural ground that they attempt to change a contract rate for the contract rate has long since ceased to exist. The relief requested by Tyler Gas and the City of Tyler must be denied.

Furthermore, with respect to the motion for refunds, the decision of the Court of Appeals for the Fifth Circuit affirming the decision of the lower court bars us from taking the action requested by Tyler Gas. On appeal from the decision of the District Court Tyler Gas listed eight specifications of error which, as the Court stated, "ring the changes on what it claims is the fundamental error of the trial court." (217 F. 2d 73, at pp. 76-77). Included among the specifications of error was an attack upon the holding that United may by the simple expedient of filing a revised schedule, without a prior hearing and finding that the contract rates are unjust, unreasonable or unlawful, disregard

the contract terms fixing minimum rates. It should be re-emphasized that the District Court had found that the conversion rates had constituted a departure from the contract rates, that such conversion rates became the lawful rates, and that the contract rates upon which Tyler Gas sought equitable relief had not been in effect for a matter of several months prior to the filing of the tariff rates in Docket No. G-2210. The affirmance of the District Court decision and express approval of the "well considered and expressed views of the district judge" by the Court of Appeals in the face of the specifications of error alleged by Tyler Gas effectively dispose of all issues raised.

If we were to order the refunds requested by Tyler Gas, it would be necessary for us to find, contrary to the law of the *Tyler Gas* case, *supra*, that United's *ex parte* tariff rate in Docket No. G-2210 was improperly filed and should have been rejected. Since we are confronted by the same parties, with the same issues and the same facts on which the Court of Appeals rendered its decision, we are bound by that judicial determination. *Angel* v. *Bullington*, 330 U.S. 183; *Commissioner of Internal Revenue*, v. *Sonnen*, 333 U.S. 591. Of course, the decision in the *Mobile* case has no bearing upon the conclusive effect of the *Tyler Gas* decision by the Court of Appeals for the Fifth Circuit. *Angel* v. *Bullington*, *supra*, at p. 187.

For the reasons stated above the Commission further *finds:*

(1) United's FPC Gas Tariff, Original Volume No. 1, the conversion tariff, filed on July 3, 1952, which became effective as to the rates for sale of gas to Tyler Gas on August 3, 1952, constituted a departure from the contract rates theretofore in effect. From August

3, 1952, there has been no contract rate in effect governing the sale of gas by United to Tyler Gas.

(2) The tariff rates filed by United in Docket Nos. G-2210, G-9547 and G-10592 were properly filed pursuant to the Natural Gas Act and the Commission's Regulations issued thereunder.

(3) The motion for refunds filed by Tyler Gas on May 15, 1956, in Docket No. G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas, on October 21, 1955, and June 15, 1956, request action which is contrary to the provisions of the Natural Gas Act and the Commission's Regulations and which is not in the public interest. Hence, the motion and the joint petitions should be denied.

The Commission *orders*:

The motion for refunds filed by Tyler Gas on May 15, 1956, in Docket No. G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas, on October 21, 1955, and June 15, 1956, are hereby denied.

By the Commission.

LEON M. FUQUAY,
Secretary.

Filed December 30, 1953
James R. Cooney, Clerk, U.S. Court
By Dave M. Price
Deputy

In The

United States District Court

Eastern District of Texas, Tyler Division

Civil Action No. 1662

Tyler Gas Service Company, et al,

Plaintiffs,

versus

United Gas Pipe Line Company,

Defendant.

Thomas B. Ramey, of Tyler, Texas; and Bryce Rea, Jr., of Washington, D.C.; for Plaintiff Tyler Gas Service Company.

Troy Smith, of Tyler Texas; for Plaintiff City of Tyler.

Thomas Fletcher, of Houston, Texas; for Defendant.

December 29, 1953

Memorandum: —

The two plaintiffs seek the intervention of the equitable powers of this Court to restrain the defendant from filing a contemplated pleading in a proceeding now pending before the Federal Power Commission. Tyler Gas Service Company (Tyler Gas), a corporation chartered under the laws of this State, is a local natural gas distributing company, selling at retail to the residents of Tyler, Texas. The

City of Tyler (City) is a municipal corporation likewise chartered under the laws of Texas, with a population of some 40,000 persons. United Gas Pipe Line Company (United) is a Delaware corporation engaged in the transportation and sale of natural gas in interstate commerce for resale. As such, it is a "Natural-Gas Company" within the terms of the Natural Gas Act of 1938 (15 U.S.C.A. 717, et seq.).

Tyler Gas has been purchasing its gas from United since 1940 under the terms of a written contract and several amendments thereto. United has applied to the Federal Power Commission for an increase in rates considerably in excess of those presently in force, and this controversy results from efforts of Tyler Gas and City to restrain the impending institution of such proposed rate schedule.

The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet (Mcf), for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under

serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquired the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

About July 1, 1952, United filed with the Commission a schedule of rates[1] (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff, United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with its customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

On June 24, 1953, United filed with the Commission another revision of its schedule of rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

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[1] Referred to as "conversion rates, as it served to convert United's schedule of rates from contract form to tariff form. Such a change in form was required by rules of the Commission.

Upon the filing of the new proposal, by order of July 10, 1953 the Commission set a hearing for July 20, 1953 to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, "In the Matters of United Gas Pipe Line Co.") in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until December 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4 (e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expires December 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953.

The initial hearing was held July 20, 1953, as scheduled. Some testimony was taken, and the hearing was then adjourned to be reconvened at a later date. At the present time, it has not been so reconvened. As it appears that United's entire rate structure throughout several states is at issue before the Commission, in all probability the final determination will be long delayed.

Thus plaintiffs say that, come December 25, 1953, United proposes, pursuant to said Section 4 (e), to file its motion as contemplated thereby, moving the Commission to permit the proposed schedule to go into effect; that on that date

the five-month suspension period permitted the Commission by terms of the statute will have expired; and thereafter it will have no discretion but to permit the increase. While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is argued that this will simply retain the status quo until the Commission has time to act.

Federal jurisdiction exists by reason of diversity of citizenship and amount in controversy, as alleged. Having jurisdiction as well of the parties and subject matter, I pass to the main question, whether the plaintiffs have made a case calling for the exercise of the equitable powers of the Court. The briefs which have been filed by counsel for all parties have been most helpful in the consideration of this question. They fail to disclose any authority directly in point; but from the principles which are clearly established by the authorities, I am convinced that the relief prayed for may not be granted.

It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. While it is no doubt an oversimplification of the problem, for present purposes it will suffice to say that the business of United is one charged with a public interest; hence, one in its position may not by private contract for future rates collect a rate which is found to be excessive, because such would be unfair to the consumer; neither may it bind itself to rates which are determined to be confiscatory, because to permit such utility

to charge and collect rates which are confiscatory of its own property would jeopardize its ability properly to serve the public in the future (*Union Dry Goods Co.* v. *Georgia Pub. Serv. Co.*, 248 U.S. 372, and cases there cited).

Thus the rate-fixing provision of the United-Tyler Gas contract, as well as many other provisions thereof, are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with the governmental regulation or with public policy, the former must yield (*Colo. Interstate Gas Co.* v. *Fed. Power Comm.*, 142 Fed. (2d) 943, aff. 324 U.S. 581, and cases there cited). In such cases, compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise to a cause of action in favor of the other, either for money damages (*Miss. Power & Light Co.* v. *Memphis Natural Gas Co.* (162 Fed. (2d) 388) or for specific performance (*Mich. Consol. Gas Co.* v. *Panhandle Pipe Line Co.*, 173 Fed. (2d) 784).

So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable — and hence lawful — is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

While I think it clear that the utility, despite its contract to the contrary, may apply to the appropriate governmental

agency for a review of its rate structure, it is equally clear that such utility may not, by purely unilateral action, and without pursuing the statutory method to secure review by the regulatory body, disregard its current contract rates and initiate higher ones (*Southern Util. Co.* v. *City of Palatka*, 268 U.S. 232). Plaintiffs contend that the action of United should be so characterized here, and that it should not, during the long interval while the Commission has the matter under consideration, be permitted to collect rates which the Commission has not approved, and which represent only United's own estimate of the rates which it would be just and reasonable for it to collect. The proposed schedule actually is United's "asking price", and in all probability on final determination by the Commission will be whittled down substantially. The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates. United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates; and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (*Hope Nat. Gas Co.* v. *Fed. Power Comm.*, 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service *shall* go into effect." (Emphasis added.) It is not for this Court to add another proviso, reading "and where there is no private agreement or contract to the contrary".

Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to give adequate relief.

The fact that the so-called "contract rates" agreed upon between the parties here at all times are subject to the approval of, and to modification or change by, the Commission is illustrated by the institution of the new "conversion rates" directed by order of the Commission of July 31, 1953. While the change thus effected was not great dollar-wise, it nevertheless constituted a departure from the figures upon which the parties had agreed. Such new rates became the lawful ones by virtue of the order of the Commission mentioned above, and hence the provisions of the amended contract which purported to fix the rates for a long period of time in the future, and upon which plaintiffs base their claim for equitable relief, have not been in effect for a matter of several months. During that period when the contract rates were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received their vitality and breath of life from the fact that the Commission permitted such contract to be filed and ordered such rates into effect until further notice. By the order which accomplished this result (plaintiffs' Exh. 19), the Commission was careful to provide that such action should not "be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate."

Adopting the view as outlined above, and by reason of my desire to file this memoranda as soon as possible, I forego the consideration of a number of other questions presented by the pleadings. Among these are certain questions raised by the presence of the City of Tyler. The plaintiffs contend that United was a party to a contract not only

with Tyler Gas, but that its telegram of February 28, 1946, its letter of April 3, 1946 to the Commission of the City of Tyler, and its conduct throughout the period during which the City was negotiating with Tyler Gas concerning a renewal of its franchise, made out a contract as well between United and the City. While I would have difficulty spelling out all the elements of a contract between United and City, undoubtedly strong elements of estoppel may be invoked by City against United. It is undisputed that City was influenced in granting the renewal franchise to Tyler Gas by the assurances from United that it would sell to Tyler Gas for a long period of time at the 12¢ rate. But I think that the presence of City here as a plaintiff does not strengthen the case against United. If it could not, by virtue of its contract with Tyler Gas, preclude its own application to the Commission for a review of its rate structure, then it could not estop itself by reason of its conduct toward the City from taking the same action.

As I view the case, it is not necessary to determine the right of the City to enter into a contract (which United questions). Neither the Federal Power Commission nor many other persons enumerated by United are indispensable parties, whose presence would be required to confer jurisdiction on the Court. Having jurisdiction, I conclude that the plaintiffs do not show grounds for equitable relief, and the action will be dismissed for that reason.

Counsel were notified December 23, 1953 of this ruling. The Clerk will file the foregoing and furnish counsel a copy thereof. This memoranda is adopted as Findings of Fact and Conclusions of Law under Rule 52.

Counsel for defendant will submit order within ten (10) days.

Done at Houston, Texas, this 29 day of December, 1953.

BEN C. CONNALLY
Judge

FILED
.....M. 1-27, 1954
James R. Cooney, Clerk, U. S. Court
By Dave M. Price
Deputy

In The

District Court of the United States

For The Eastern District of Texas
Tyler Division

Civil Action No. 1662

Tyler Gas Service Company, et al,
Plaintiffs,

vs.

United Gas Pipe Line Company,
Defendant.

ORDER

For the reasons assigned in the memorandum of the Court filed herein on December 30, 1953, containing the Court's Findings of Fact and Conclusions of Law, to which memorandum, Findings and Conclusions reference is made:

It is ORDERED, ADJUDGED and DECREED:

1.

This Court has jurisdiction of the subject matter of this cause and of the parties hereto.

2.

Neither the Federal Power Commission nor any other of the persons enumerated by the defendant are indispensable parties whose presence is requisite to jurisdiction of this Court.

3.

The application of Plaintiffs for temporary injunction is denied and this cause is herewith in all things dismissed for failure of the Bill of Complaint to state or show grounds for equitable relief.

4.

All costs in this behalf incurred are herewith taxed against Plaintiffs, for which the officers of this Court may have their several executions.

ENTERED at Houston, Texas, this the 26th day of January, 1954.

BEN C. CONNALLY
Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15034*

TYLER GAS SERVICE COMPANY and
THE CITY OF TYLER, TEXAS,
Appellants,

versus

UNITED GAS PIPE LINE COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS.

(November 24, 1954.)

Before HUTCHESON, Chief Judge, and BORAH and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: Alleging that United Gas Pipe Line Company, a "Natural Gas Company", was under

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* Reported at 217 F. (2d) 73.

binding term contracts as to rates with the City of Tyler and the Tyler Gas Service Company, the operators of a system for the local distribution and sale of gas and the holder of a gas franchise from the city, and that, in violation of their express covenants, it had filed with the Federal Power Commission and was proposing, at the end of the suspension period, to put into effect a schedule of higher rates, Tyler and Tyler Gas filed this suit seeking: (1) a preliminary injunction to restrain United from putting the schedule into effect; (2) a judgment declaring the contracts to be in all things valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof.

The defendant moved for a dismissal of the complaint for want of jurisdiction and for want of equity and failure to state a claim because it in effect seeks to enjoin compliance by the defendant with the provisions of the Natural Gas Act,[1] and more particularly Section 4 thereof,[2] and because it in effect bases its claim to declaratory and injunctive relief upon the theory and contention that the contracts relied on override and nullify the duties, powers, obligations and procedures imposed and conferred by the act on defendant as a natural gas company under the Act, indeed override the provisions of the Act itself. In addition, it moved for a dismissal as to the City of Tyler for the reason that

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1 15 U.S.C., Chapt. 15B, Sec. 717 to 717w.

2 "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 15 U.S.C., Sec. 717c(d).

the city was not a party to the contracts and had no capacity to sue on or in respect of them, and filed a lengthy answer, which, because of the manner in which the case went off, it is not necessary to here set out.

The matter thereafter coming on for hearing on the application for preliminary injunction, the district judge filed a carefully worded opinion in which, summing up the facts,[3] as to which there is no serious dispute, and discuss-

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[3] "The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

ing the applicable law, he held: that federal jurisdiction existed by reason of diversity and jurisdictional amount; that United is a natural gas company subject to the act; that being such it cannot by private contract fix binding long term future rates; and that plaintiffs must, therefore, seek such relief as they may be entitled to under the statute from the commission and not from the court.

"During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

"About July 1, 1952, United filed with the Commission a schedule of rates (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff [so called because it converted United's schedule of rates from contract to tariff form as required by rules of the Commission], United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

"Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would coustitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with the customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

"On June 24, 1953, United filed with the Commission another revision of its schedule or rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

"Upon the filing of the new proposal, by order of July 10, 1953, the Commission set a hearing for July 20, 1953, to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, 'In the Matters of United Gas Pipe Line Co.') in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until Dec. 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expired Dec. 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953. * * *"

So holding, he denied the preliminary injunction and dismissed the bill for want of equity, and plaintiffs have appealed.

Here, while conceding that the commission on final hearing may fix reasonable rates higher than the contract fixes them, appellants insist: that unless and until the contracts sued on are set aside for some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with higher rates.

In support of their view, that this cannot be done and that the court erred in denying the preliminary injunction and dismissing the complaint for want of equity, appellants, in eight specifications of error,[4] which ring the changes on

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4 "I. The Court erred in holding that the Defendant was not precluded by its contracts with plaintiffs from invoking the provisions of the Natural Gas Act to increase gas rates provided in such contracts, in advance of a full hearing and final determination by the Federal Power Commission;

"II. The Court erred in refusing to enjoin Defendant from taking steps permitted by the Natural Gas Act to make effective increased gas rates charged Plaintiff Tyler Gas Service Company, in advance of a full hearing and final determination by the Federal Power Commission;

"III. The Court erred in holding that the provisions in the contracts between Plaintiffs and Defendant fixing maximum rates for gas were subject to abrogation, even though no proof was made that same was in the public interest;

"IV. The Court erred in holding that the Defendant was authorized under the Natural Gas Act by unilateral action to increase gas rates charged Tyler Gas Service Company in contravention of the contracts between Plaintiffs and Defendant;

"V. The Court erred in refusing to enjoin Defendant from violating its contract with, and representation to, the City of Tyler that during a period of sixteen years Defendant would sell gas to Tyler Gas Service Company (or to the City of Tyler if it should acquire the property of said Company) at rates not in excess of stipulated maximum rates;

"VI. The Court erred in holding that by virtue of the provisions of the Natural Gas Act the Court was without power to grant the relief sought by Plaintiffs;

"VII. The Court erred in holding that only the Federal Power Commission is authorized to grant the relief sought by the Plaintiffs herein;

"VIII. The Court erred in dismissing the Complaint for failure to show grounds for equitable relief."

what it claims is the fundamental error of the trial court, attack its holding that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Commission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates.

Moving forward under these specifications and conceding that a contract fixing utility rates is deemed to have been made subject to the sovereign power of the government to alter it under proper circumstances, appellants insisting that it is not void but only voidable, quote from Vol. 73, C.J.S., Public Utilities, §16, pages 1012-1013, where it is said:

> "Such a contract is, however, voidable only in that it can not stand against modification by competent authority; and it is obligatory on the parties until abrogated by the state, falling only when the rate is altered or a different rate is fixed."

and from 43 Am. Jur. page 639:

> "Until the legislature or other body having the right to prescribe rates to be charged by public utilities has exercised this power, the rates are subject to contract between the corporation and its patrons, and such contracts will be deemed valid by the courts, and may be enforced by an appropriate mode."

Proceeding from the premises these contentions and citations supply, appellants insist that Section 4, subd. (d) and (e) of the Natural Gas Act do not authorize a natural gas company to increase rates fixed by contract solely by its own action in filing a new schedule with the commission; that this can be done only after a full hearing and determination that the contract rates are not in the public interest because unjust, unreasonable, or unlawful.

Citing in support *Colorado Interstate Co.* v. *Federal Power Commission,* 10 Cir., (142 F(2) 943, and insisting

that nothing in Secs. 4, 4(e) and 5(a) of the Natural Gas Act is inconsistent therewith, the appellants urge upon us that the district judge erred in refusing interlocutory equitable relief and in dismissing the bill for want of equity.

We do not think so. We find ourselves, on the contrary, in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission.

Based upon these views, he thought, as we do, that the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act.

So thinking, he rejected, as we reject, the plaintiff's view that the district court could and should grant the relief asked, (1) an injunction prohibiting United from proceeding under Section 4 of the Act, and (2) a decree in effect requiring it to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding.

By supplemental brief, appellants urge upon us that the decision and judgment of the court below, that plaintiffs could not resort to the courts for relief but were remitted to the remedies provided by and under the Natural Gas Act, was a holding in effect that the United can by purely unilateral action, disregarding indeed nullifying its current rates, initiate higher ones.

As the district judge correctly pointed out in his opinion, this is not a correct, it is an incorrect, characterization of United's action in filing its schedule. Saying, "The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates.", the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the court cannot do.

Finally, attaching to their supplemental brief a copy of the opinion of the Court of Appeals for the Third Circuit, in *Mobile Gas Service Co.* v. *Federal Power Commission*, 215 F. 2d 883, 892, appellants invoke as authority for their contention below and here, the majority opinion of that court holding that, under Section 4(d) of the Act, "The commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates."

Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that "Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief."; and that the plaintiffs did not show grounds for equitable relief.

The judgment appealed from is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15034

JUDGMENT.

Extract from the Minutes of November 24, 1954.

TYLER GAS SERVICE COMPANY and THE CITY OF TYLER, TEXAS,

v.

UNITED GAS PIPE LINE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Tyler Gas Service Company and The City of Tyler, Texas, and the surety on the appeal bond herein, Saint Paul-Mercury Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

CLERK'S OFFICE:—
ATTEST:—
A TRUE COPY:—

JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals,
Fifth Circuit,
By CLARA R. JAMES
Chief Deputy Clerk.

New Orleans, Louisiana
October 25th, 1955.
[SEAL]

UNITED GAS PIPE LINE COMPANY

DETAIL OF CALCULATIONS RESULTING IN REFUND ORDERED PURSUANT TO PARAGRAPH D OF THE FEDERAL POWER COMMISSION ORDER OF NOV. 2, 1954 - DOCKET G-2210
TO
TYLER GAS SERVICE COMPANY

Tyler, Texas	Amount Billed	As Recomputed under Settlement Rates: Billing Demand	8 Times Billing Demand	Billing Volumes: First Block	Second Block	Total	Revenues	Refund before Interest	Date of Receipt of Amount Billed	Days Elapsed from Date of Receipt thru Jan. 31, 1955	Interest (1)
DG-C Rate											
Date											
1953											
Dec. 25 thru Dec. 31	$ 12,923.73	19,424	35,091(2)	35,091	47,306	82,397	11,878.60	1 045.13	2-11-54	355	60.93
1954											
January	54,920.63	20,433	163,464	163,464	187,150	350,614	51 182.63	3,738.00	3- 1-54	337	207.87
February	41,811.25	20.433	163,464	163,464	64,195	227,659	35,811.26	4,997.99	4- 6-54	302	276.76
March	44,053.25	20,433	163,464	163,464	91,152	254,616	39,142.38	4,870.37	4-10-54	287	271.76
April	25,377.20	20,433	163,464	126,652		126,652	21 530.84	3,346.36	5- 1-54	275	186.35
May	24,229.40	20,433	163,464	120,308		120,308	20,452.36	1,777.04	5-28-54	218	119.35
June	18,334.00	20,433	163,464	91,422		91,422	15,541.74	2,792.26	7-23-54	193	148.69
July	17,836.00	20,433	163,464	88,810		88,810	15,097.70	2,737.30	8-20-54	158	121.09
August	18,328.80	20,433	163,464	91,278		91,278	15,517.26	2,811.54	9-27-54	127	93.70
September	18,121.00	20,433	163,464	90,303		90,303	15,351.51	2,769.49	10-26-54	98	66.62
October	26,783.20	20,433	163,464	133,755		133,755	22,738.35	4,044.85	11-23-54	69	42.55
November	40,705.18(3)	20,433	163,464	163,464	64,406	227,870	35,813.63	4,965.55	12-28-54	35	27.80
December	47,711.50	20,433	163,464	163,464	134,268	297,732	44,322.33	4,881.12	1-27-55	4	4.32
Total Thru December	$383,134.14							$48,705.91	$3,135.00		$1,570.91

(1) $.000164383561b per dollar per day
(2) 8 x 19,424 x 7/31
(3) Includes adj. to Oct. billing - $(22.20)

Acknowledgment of Payment and Release

The undersigned hereby acknowledges receipt of the entire amount of refund of $3,135.00, and interest at 6% per annum of $1,570.91 due from United Gas Pipe Line Company under the terms, conditions and reservations set out in Opinion and Order No. 277 issued by the Federal Power Commission November 2, 1954, in F.P.C. Docket Nos. G-2210, et al, as computed in the above statement, ~~and hereby releases United Gas Pipe Line Company from all claims and obligations under said Opinion and Order.~~

Tyler Gas Service Company
(Customer)

By J. W. Hudson
(Title) Pres.

Date February XX 1955

UNITED GAS PIPE LINE COMPANY

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OF THE FEDERAL POWER COMMISSION ORDER OF NOV. 2, 1954 - DOCKET G-2210
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TYLER GAS SERVICE COMPANY

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June	18,334.00	20,433	163,464	91,422		91,422	15,541.74	2,792.26	7-23-54	193	148.69
July	17,836.00	20,433	163,464	88,810		88,810	15,097.70	2,737.30	8-20-54	158	121.09
August	18,328.80	20,433	163,464	91,278		91,278	15,517.26	2,811.54	9-27-54	127	93.70
September	18,121.00	20,433	163,464	90,303		90,303	15,351.51	2,769.49	10-26-54	98	66.62
October	26,783.20	20,433	163,464	133,755		133,755	22,738.35	4,044.85	11-23-54	69	42.55
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Tyler Gas Service Company
(Customer)

By J. W. Hudson
(Title) Pres.

Date February XX 1955

PROVISIONS OF NATURAL GAS ACT (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq.)

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

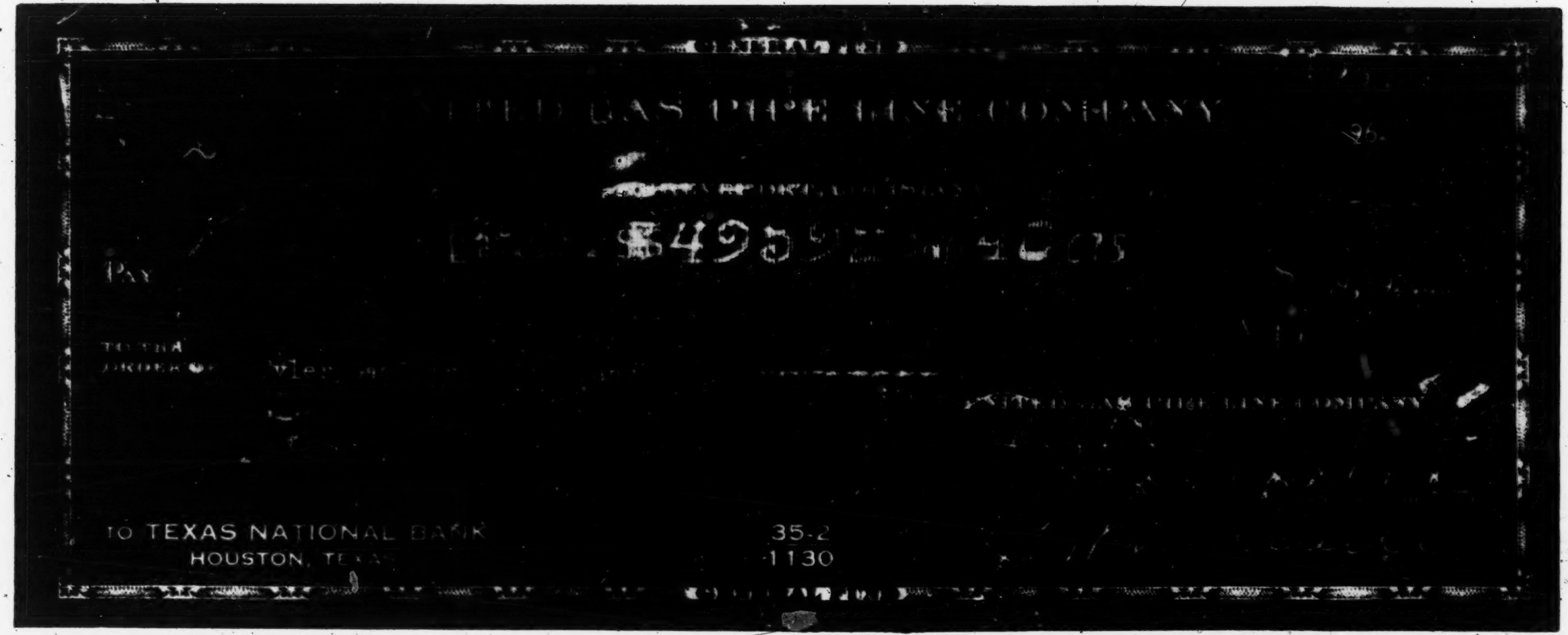
(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

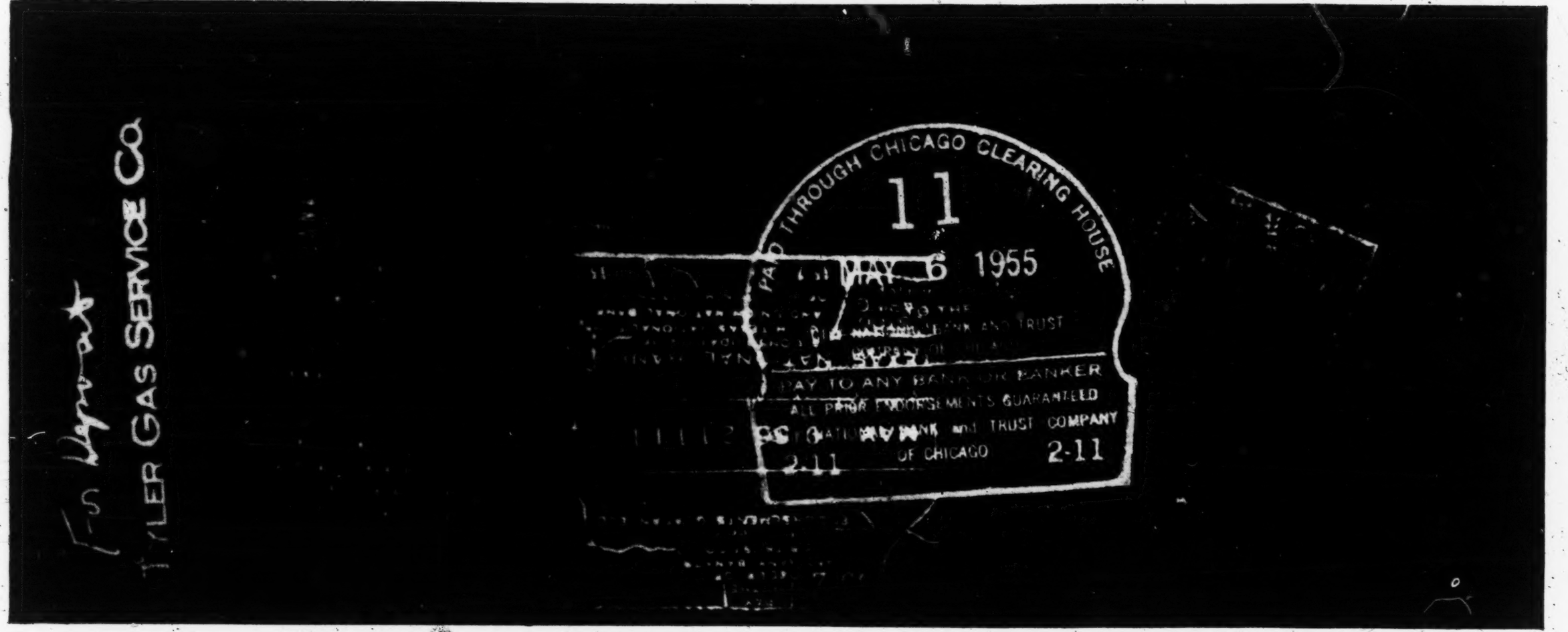
(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations,

or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the pro-




TYLER GAS SERVICE CO
PAID THROUGH CHICAGO CLEARING HOUSE
11
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PAY TO ANY BANK OR BANKER
ALL PRIOR ENDORSEMENTS GUARANTEED
OF CHICAGO
2-11
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ceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. 717c (1946)]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract

to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. 717o (1946)]

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No

objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave of adduce additonal evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its finding as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia,

or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any rule, regulation, or order of the Commission thereunder.

(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission. [52 Stat. 832 (1938); 15 U.S.C. 717s (1946)]

SEC. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall

have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U.S.C. 717u (1946)]

FROM ORDER 144 OF THE FEDERAL POWER COMMISSION PROMULGATING REGULATIONS UNDER THE NATURAL GAS ACT

§154.11 Rate Schedule

The term "rate schedule" means a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission, and all terms, conditions, classifications, practices, rules and regulations affecting such rate or charge. This term also includes any contract for which special permission has been obtained in accordance with §154.52.

§154.38 Composition of Rate Schedule

The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) Title. Each rate schedule shall have a title consisting of a designation (see §154.34) and a statement of the type or classification of service to which it is applicable.

(b) Availability. This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) Applicability and character of service. This paragraph shall fully describe the kind or classification of service to be rendered.

(d) Statement of rate. (1) Except as permitted in §§154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to §154.52 that it is or will be its privileges, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided, further, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in §4 of the Natural Gas Act, as amended, and the regulations in this part.

(e) Minimum bill. The minimum bill heading shall appear on every rate schedule followed by the word "none" if no minimum bill is provided.

(f) Other provisions. All other major provisions governing the application of the rate schedule, such as determination of billing demand, contract demand, heat content, measurement base, shall be set forth similarly with appropriate headings, or if appropriate, they may be incorporated by reference to the applicable general terms and conditions.

(g) Applicable general terms and conditions. This paragraph shall list by reference the general terms and conditions set forth in the following section which apply to the particular rate schedule.

§154.39 General Terms and Conditions

This section shall contain provisions which apply to all or any of the rate schedules and which may more conveniently be arranged in a separate section of the tariff. Sub-

sections and paragraphs shall be numbered for convenient reference.

§154.40 Composition of Service Agreement

There shall be submitted as part of the tariff and unexecuted copy of each form of service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

§154.85 Status of Contracts Filed as Rate Schedules and Restated

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however, That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: Provided further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.